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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

HAROLD L. MYRON,
Petitioner,

v.

TRUST COMPANY BANK LONG-TERM DISABILITY BENEFIT PLAN, TRUST COMPANY BANK and GREAT-WEST LIFE ASSURANCE COMPANY,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH [redacted] CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Does a state evidentiary rule supercede the Employee Retirement Income Security Act of 1972 (29 U.S.C. §1001, et seq.) so that parol evidence may be used to establish offsets to an employee benefit plan even though the Act expressly requires that the governing plan document specify the basis on which payments are made to and from the plan?

PARTIES TO THIS PROCEEDING

The party-plaintiff to this proceeding is Harold L. Myron.

The party-defendants to this proceeding are Trust Company Bank Long-Term Disability Benefit Plan, Trust Company Bank and Great West Life Assurance Company.

TABLE OF CONTENTS

	Page
OPINIONS BELOW.....	2
JURISDICTION.....	2
CONSTITUTIONAL PROVISION AND STATUTES INVOLVED.....	2
STATEMENT OF THE CASE.....	3
I. The proceedings below...	3
II. The facts.....	4
REASONS FOR GRANTING THE WRIT..	11
The Court of Appeals in this case decided an important question of federal law which has not been, but should be, settled by this Court.....	11
CONCLUSION.....	29
Appendix	
Explanation of Opinion of Court of Appeals.....	A-1
Order of the District Court....	A-2
Judgment of the Court of Appeals.....	A-37
Petition for Rehearing.....	A-38
Judgment of the District Court.	A-40
Constitutional Provision and Statutes.....	A-42

TABLE OF AUTHORITIES

	Page
Cases	
Brotherhood of Locomotive Engineers v. Chicago Rock Island and Pacific Railroad Company, 382 U.S. 423 (1966)...	17-18
Cambell v. Hussey, 368 U.S. 297 (1961).....	19
Cloverleaf Butter Co. v. Patterson, 315 U.S. 148 (1942).	19
Freeman v. Baker, 187 Ga. App. 168, 248 S.E.2d 298 (1978).....	16,19-20,23
Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).....	16
Hill v. Florida ex rel. Watson, 325 U.S. 338 (1945)....	19
Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960).....	19
Industrial Welding & Tool Supplies, Inc. v. CIT Corp. 157 Ga. App. 611, 278 S.E.2d 50 (1981).....	16
Jones v. Rath Packing Co., 430 U.S. 519 (1977).....	18
Myron v. Trust Company Bank Long Term Disability Benefit Plan, 522 F.Supp. 511 (N.D.Ga. 1981).....	4,8,10
Nash v. Florida Industrial Commission, 389 U.S. 235 (1977.	19

People v. Automobile Transporters Welfare Fund, 17 A.D.2d 448, 235 N.Y.S.2d 702 (1962); aff'd 13 N.Y.2d 814, 192 N.E.2d 222; cert denied 376 U.S. 908 (1963)..... 17

Snyder v. Titus, 513 F. Supp. 926 (E.D.Va. 1981)..... 12

Constitutional Provision and Statutes

Employee Retirement Income Security Act, 29 U.S.C. §1101, et seq..... passim

Section 2, 29 U.S.C. §1001..... 11

Section 102, 29 U.S.C. §1022..... 21

Section 104, 29 U.S.C. §1024..... 21

Section 402, 29 U.S.C. §1102..... 11,13,21

Section 404, 29 U.S.C. §1104..... 14,21

Section 409, 29 U.S.C. §1109..... 25-26

Section 501, 29 U.S.C. §1131..... 25-26

Section 502, 29 U.S.C. §1132..... 25-26

Section 514, 29 U.S.C. §1144..... 11,17

United States Constitution, art. VI, §2..... 16

Welfare and Pensions Plans Disclosure Act, Pub.L.No. 85-836, 72 Stat. 997..... 17,25

Miscellaneous

Annotation, 81 ALR2d 999..... 23

Corbin on Contracts, §508-519 (1 Vol.ed. 1952)..... 23

H.R. Rep. No. 93-533, 93rd Cong., 2d Sess., reprinted in [1974] U.S. CODE CONG. & AD. News, 4639..... 14,15

H.R. Rep. No. 93-1280, 93rd Cong. 2d Sess., reprinted in [1974] U.S. CODE CONG. & AD. News, 5021..... 14,15

S. Rep. No. 93-127, 92nd Cong. 2d Sess. 5, reprinted in [1974] U.S. CODE CONG. & AD. News, 4838..... 15,25

S. Rep. No. 93-383, 93rd Cong. 2d Sess. 18, reprinted in [1974] U.S. CODE CONG. & AD. News, 4890..... 14

4 Williston on Contracts, §583 (3rd ed. 1961)..... 23

IN THE

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TRUST COMPANY BANK LONG TERM DISABILITY BENEFIT PLAN, TRUST COMPANY BANK and GREAT WEST LIFE ASSURANCE COMPANY,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner Harold L. Myron requests that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered on October 20, 1982, and issued as mandate on January 13, 1983.

OPINION BELOW

The judgment of the Court of Appeals (A-37) was issued without opinion and was marked "Do Not Publish." The opinion of the District Court (A-2) is officially reported as Myron v. Trust Company Bank Long Term Disability Benefit Plan, 522 F.Supp. 511 (N.D. Ga. 1981).

JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals was dated and entered October 20, 1982 (A-37). The order denying the petition for rehearing filed on behalf of the petitioner was entered on December 1, 1982 (A-38). This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case was brought under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1001 et seq. (A-42). This case principally involves

the following sections of that act: §104(b)(4) (29 U.S.C. §1024(b)(4)) (A-42); §402 (29 U.S.C. §1102) (A-51); §404 (29 U.S.C. §1104) (A-53); §502(c) (29 U.S.C. §1132(c)) (A-56); and §514(a) (29 U.S.C. §1144) (A-58) and United States Const., Art. VI, §2 (the "supremacy clause").

STATEMENT OF THE CASE

I. Proceedings in the courts below

The petitioner, Harold L. Myron, filed this action in August, 1980. Named as defendants were Trust Company Bank Long-Term Disability Plan ("the disability plan"), Trust Company Bank ("Trust Company"), and Great-West Life Assurance Company ("Great West"). The jurisdiction of the District Court was invoked under 29 U.S.C. §1132. The petitioner claimed in the complaint, as amended, that he was entitled to receive monthly benefits of $1,770 per month under the disability plan. The defendants claimed in their answers that the plaintiff was eligible for disability benefits of only $50.00 per month.

Following discovery, cross-motions for summary judgment were filed. The District Court denied the petitioner's motion and granted the defendants' motion, entering final judgment for the defendants. The Eleventh Circuit affirmed the judgment of the District Court without opinion and denied the petitioner's motion for rehearing.

II. Facts.

The petitioner retired from the United States Army in 1973, after 30 years of service. Shortly after his retirement, he became an employee of Trust Company and began receiving military retirement pay.[1/]

Trust Company sponsored a disability plan for its employees. Until April 30,

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[1/] The District Court's order indicates that petitioner began receiving military retirement pay as of "August 1, 1979." Myron v. Trust Company Bank Long Term Disability Benefit Plan, 522 F.Supp. 511, 513 (N.D.Ga. 1981). (A-4). That is probably a typographical error, as the benefit commencement date was August 1, 1973.

1979, the plan was insured and administered by Northwestern National Life Insurance Company ("Northwestern"). The petitioner was furnished with a written description of that plan. On May 1, 1979, Trust Company adopted a new disability plan with Great West. Under the new plan, eligibility requirements were liberalized, maximum benefits were increased, and the method of funding was changed from a fully insured plan to a self-funded plan which had only residual insurance.

In early 1978, the petitioner began receiving some of his military retirement in the form of income-tax free disability benefits. In May, 1979, the petitioner notified Trust Company that he would be taking disability retirement. In July, 1979, he was advised by Trust Company that his military retirement would be offset against the benefits provided by its disability plan. He was furnished a copy of the provi-

sions of the Northwestern plan which provided for offsets. He was not advised of the expiration of the Northwestern plan and the commencement of the new Great West plan or of the changes effected thereby. Because he was not advised of these changes, he did not question the offsets.

On July 31, 1979, the petitioner retired due to a total and permanent disability. As of January, 1980, he was awarded basic social security retirement benefits of $485.50 per month. In February, 1980, after he submitted a disability claim, a $1,770 benefit was approved by Great West subject to an offset for his social security benefits.

In March, 1980, after he was sent two benefit checks, that approval was rescinded. At that time, the defendants advised the petitioner that both his social security benefits and military retirement benefits should have been offset against his basic

benefit, thereby reducing the benefit to the plan minimum of $50 per month.

In order to determine the basis of the defendants' contentions, in April, 1980, the petitioner, through his attorney, requested a copy of the governing plan documents. In response, the defendants sent him a copy of the Northwestern disability plan. That expired plan contained the offset provisions relied upon by the defendants. Upon further inquiry, he was furnished copies of an initial draft of the Great West plan. The draft had been prepared in December, 1979, more than four months after his disability retirement. The offsets contained in that draft were different than the offsets contained in the Northwestern plan. Those offsets clearly did not include his military retirement. The defendants contended, however, that this draft had not been approved.

Unknown to the petitioner at the time, the only written document memorializing the Great West disability plan which existed on the date of his retirement provided for no offsets. It was an application for insurance which had been accepted and administered by Great West as though a formal plan had been issued. As the District Court acknowledged:

> The application, Gill Deposition, Exhibit 19, does contain the four required features of an ERISA 'plan' as set out in [29 U.S.C.] Section 1102(b). There is no mention of any offset provisions in the application."

Myron, 522 F.Supp. at 517 (A-18). The petitioner was not furnished a copy of the application until after this action was commenced in August, 1980.[2/]

[2/] The District Court's order states that "defendants provided plaintiff with copies of both the Northwestern plan and the application which together contained all of the aspects of the plan relevant to this action." Myron, 522 F.Supp. at 519. (A-30). This statement implies that the petitioner was furnished the application pursuant to his request in April, 1980,

According to the Great West employee who approved the petitioner's disability claim, the approval was based upon the application. According to that employee's supervisor, the approval was based upon the initial Great West draft.[3/] In any event, all acknowledge that the application was the only document which had been accepted by the parties at the time of the petitioner's disability retirement and at the time of his benefit commencement. No formal Great West plan was approved until after this litigation began. Apparently, that final plan document incorporated the same offset provisions as were contained in the Northwestern plan.

2/ (Cont'd.) but it was not furnished then. The petitioner is not aware of any conflicting evidence or contentions concerning this point.

3/ The latter explanation is more likely, as the approval was subject to an offset for social security benefits and the draft, but not the application, provided for such an offset.

The petitioner contends that the application controls and that he is entitled to receive disability benefits of $1,770 per month unreduced by offsets. The defendants contend, and the lower courts concluded, that the petitioner's benefits should be reduced by the offsets contained in the expired Northwestern plan. This result is based entirely on parol evidence provided by the defendants' employees and agents stating that Great West and Trust Company intended that the offsets contained in the Northwestern plan would be carried forward into the new Great West plan. It is manifest that this intention was not evidenced by the application (or the initial Great West draft). As the District Court observed:

> If only the provisions of the application for insurance were relevant here, the Court would be inclined to rule for plaintiff. However, because of the admissible parol evidence existent here, the Court cannot do so.

Myron, 522 F.Supp. at 517.

REASONS FOR GRANTING THE WRIT

The Court of Appeals in this case has decided an important question of federal law which has not been, but should be, settled by this Court.

This case arose under ERISA, a remedial statute which subjects employee benefits plans to a comprehensive regulatory scheme. ERISA was enacted for the stated purpose of curbing abusive practices in the establishment, maintenance and administration of such plans. 29 U.S.C. §1001 (A-42). ERISA expressly preempted conflicting state law. 29 U.S.C. §1144 (A-58).

In this case the District Court found that Trust Company's written application to Great West for insurance set out the elements essential under ERISA for a disability plan (29 U.S.C. §1102(b)). That application did not contain any provision for offsets against plan benefits. Yet, that Court found that the application for insurance was

not an integration of the disability plan and permitted the defendants to use parol evidence to incorporate into the Great West plan offset provisions contained in the expired Northwestern plan.[4/] In doing so,

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[4/] An analogous situation existed in Snyder v. Titus, 513 F.Supp. 926 (E.D.Va. 1981). There, a pension claimant was denied benefits when the trustees referred to the provisions of a prior plan to determine whether to disregard service credits earned during the period the prior plan was in effect. This was done even though the current plan made no reference to the prior plan in connection with the termination of service credits. In concluding that the denial of the claimant's benefits was wrongful, the court reasoned: "If the Trustees' interpretation of the plan were correct -- that alleged omissions in current versions of the Pension Fund are to be filled by reference to relevant prior versions of the plan -- participants and Trustees alike would be required to read and understand the current as well as all prior versions of the plan in the event an interested party claims a 'gap' exists in the effective version... the Trustees have read an ambiguity into the pension plan that is not apparent on the face of the plan, and for which no justification has been given. The Court cannot permit such an unfounded interpretation to deprive an employee of his benefits where he has no way of anticipating such a deprivation upon reading the clear language in the plan in effect at the time of his application. A contrary result, the Court believes, would open the door to a shell game in the administration of pension plans, frought [sic] with potential abuse and caprice." 513 F. Supp. at 933-35.

the Court used state law regarding parol evidence to contradict the clear Congressional mandate as to the form that an employee welfare plan must assume.

The Congressional command is this:

> (a)(1) Every employee benefit plan shall be established and maintained pursuant to a written instrument....
>
> (b) Every employee benefit plan shall -
>
> (1) Provide a procedure for establishing and carrying out a funding policy and method consistent with the objectives of the plan and the requirements of this title,
>
> (2) describe a procedure under the plan for the allocation of responsibilities for the operation and administration of the plan...,
>
> (3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan, and
>
> (4) specify the basis on which payments are made to and from the plan.

29 U.S.C. §1102 (emphasis supplied). (A-46).

The requirement that an employee benefit plan be written and contain four key elements is coupled with the mandate that:

> (a)(1)...a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and--...
>
> (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title or title IV.[5/]

29 U.S.C. §1104. (A-53).

[5/] The Joint Conference Report on ERISA noted that "[U]nder the Conference substitute, plan fiduciaries also must act in accordance with plan documents and instruments to the extent that they are consistent with the requirements established in the bill." 1974 U.S. CODE CONG. & AD. News, 5083. A similar comment was contained in the report accompanying the Senate Bill. Id., at 4988. The reports of the House Education and Labor Committee and the Senate Labor and Public Welfare Committee, which accompanied the Bills in the House and Senate, respectively, stated: "The principles of fiduciary conduct are adopted from existing trust law, but with modifications appropriate for employee benefit plans. These salient principles place a two-fold duty on every fiduciary; to act in his relationship to the plan's fund as a prudent man in a similar situation and under like conditions would act, and to act consistently with the principles of administering the trust for the exclusive purposes previously enumerated, and in accordance with the documents and instruments governing the fund unless they are inconsistent with the fiduciary principles of the section." Id. at 4651 and 4866. (Emphasis added.)

The requirement that the plan be established and maintained in writing is a safeguard to ensure that "every employee may, on examining the plan documents, determine exactly what his rights and obligations are under the plan." Conference Committee Report, 1974 U.S. CODE CONG. & AD. News at 5077-5078. It is manifest that parol affidavits and depositions are not "plan documents" from which Congress intended that covered employees discern their rights and duties.[6/] The use of parol evidence to

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[6/] Congress was particularly concerned about the effectiveness of communication of plan contents to participants. The reports accompanying both the Senate and House Bills noted that: "Subcommittee findings were abundant in establishing that an average plan participant, even where he has been furnished an explanation of his plan provisions, often cannot comprehend them because of the technicalities and complexities of the language used." 1974 U.S. Code CONG. & AD. News, pp. 4646 and 4847. The worst fears of Congress are realized by this case, as no participant could have even determined what constituted the plan.

establish offsets to the schedule of benefits set forth in the Great West application is in direct conflict with the directive that the plan document "specify the basis on which payments are made to and from the plan" and that the plan be administered in accordance with its governing documents.

Assuming that the lower courts' interpretation of the state law of parol evidence is correct, that law must yield in a direct conflict with a supreme federal directive.[7/] U.S. Const. art. VI, §2; Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824). Congress intended that the ERISA scheme regulating plan establishment, reporting and disclosure

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[7/] This case presents the unique issue of which law prevails in a conflict between a state rule of evidence and a rule of substantive federal law. The lower courts' decisions in this case create the issue even though the application of the parol evidence rule is tenuous in light of the Georgia rule that documents comprising a contract required to be in writing must be "internally connected [and] intelligible without parol aid." Freeman v. Baker, 147 Ga. App. 168, 248 S.E. 2d 298 (1978); Industrial Welding & Tool Supplies, Inc. v. CIT Corp., 157 Ga. App. 611, 278 S.E.2d 50 (1981), see discussion, infra, at 19-20.

would apply uniformly in all jurisdictions, unaffected by local law. That intention was stated as follows:

> (a) Except as provided in subsection (b) of this section [dealing with pre-ERISA regulation of insurance, banking, and securities] the provisions of this title [29 U.S.C. §§1001-1144] and title IV shall supercede any and all state laws insofar as they may now or hereafter relate to any [covered] employee benefit plan....[8/]

29 U.S.C. §1144(a) (1976). (A-58).

In this case, the law of parol evidence and its exceptions are not specifically targeted at benefit plans; yet as applied, it unavoidably "related to" those plans, and its use was impermissible. Where the mandate of Congress is explicit it is controlling. Brotherhood of Locomotive Engineers v.

[8/] A Congressional intention to preempt state laws concerning the reporting and disclosure aspects of employee benefit plans was found under ERISA's predecessor, the Welfare and Pensions Plans Disclosure Act, Pub. L. No. 85-836, 72 Stat. 997 (1958). See People v. Automobile Transporters Welfare Fund, 17 A.D.2d 448, 235 N.Y.S.2d 702 (1962); aff'd 13 N.Y.2d 814, 192 N.E.2d 222; cert denied 376 U.S. 908 (1963).

Chicago Rock Island and Pacific Railroad Company, 382 U.S. 423, 444 (1966).[9]

The purported intention of Great West and Trust Company to incorporate the offsets of the previous policy into the Great West plan is entirely irrelevant. The petitioner respectfully suggests that fiduciaries (like the defendants) really are obligated by ERISA to maintain the plan in writing so that employees can examine the plan documents and determine what their rights are. The petitioner further suggests that plan fiduciaries really are required by ERISA to administer the plan in accordance with the governing documents. Permitting plan fiduciaries to establish offsets by evidence not contained in the plan instruments is incon-

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[9] Without this explicit directive, the intent of Congress to preempt state law may be implied from the structure and purpose of the statutory framework. Jones v. Rath Packing Co., 430 U.S. 519, 525-26 (1977).

sistent with the Congressional requirement that plan instruments, and not post hoc declarations, govern. This inconsistency is fatal to the establishment of parol offsets. See, e.g., Nash v. Florida Industrial Commission, 389 U.S. 235 (1967); Hill v. Flordia ex rel. Watson, 325 U.S. 338 (1945); Cloverleaf Butter Co. v. Patterson, 315 U.S. 148 (1942).

The state in this case has no counterbalancing interest to be protected by upholding the application of its law. Cf. Cambell v. Hussey, 368 U.S. 297 (1961); Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960). In fact, Georgia law does not generally allow the use of parol evidence to aid in the establishment of a contract governed by the statute of frauds:

> In Capital City Brick Co. v. Atlanta Ice &c. Co., supra, p. 443, it is pointed out 'Any signed writing or series of writings internally connected, intelligible without parol aid, and showing or admitting an agreement coextensive with the stipulations of the alleged contract, is

> sufficient.' (Emphasis supplied.) In North & Co. v. Mendel & Brother, 73 Ga. 400, the Supreme Court held that several papers might form such a memorandum as would satisfy the Statute of Frauds provided the contents of the signed paper make reference to the other written paper as to enable the Court to construe the whole of them together. 'If, however, it be necessary to adduce parol evidence, in order to connect a signed paper with others unsigned, by reason of the absence of any internal evidence in the signed paper to show a reference to or connection with the unsigned papers, then the several papers taken together do not constitute a memorandum in writing of the bargain.' Accord, Lester v. Heidt, 86 Ga. 226, 228 (12 S.E. 214). Thus, two writings, one signed and the other unsigned, cannot be correlated by parol evidence. (Emphasis in original).

Freeman v. Baker, 147 Ga. App. 168, 248 S.E. 2d 298 (1978). The reason for this rule is simple. The use of parol evidence to establish any of the provisions of a contract contradicts the requirement that it be in writing.

Defendants Trust Company and Great West are fiduciaries with respect to the disability plan. They had many fiduciary responsibilities under ERISA. This case presents a situation in which the fiduciary requirements were largely ignored:

(1) As fiduciaries, they were bound to maintain the plan in writing and administer it according to its terms solely for the benefit of participants and their beneficiaries. 29 U.S.C. §§1102(a)(1) and 1104((A)(1) (A-51, A-53). Yet, for over 15 months after the Great West plan became effective, it was evidenced in writing only by an application. Further, in order to reduce the plaintiff's benefits from the $1,770 per month provided by the application to only $50 per month and thereby reduce the cost of the plan to them, they have sought to supplement the application by parol evidence.

(2) They were required to furnish a summary of the "material modifications in the terms of the plan" relating to eligibility, maximum benefits and funding within 90 days after the Great West plan was substituted for the Northwestern plan. 29 U.S.C. §§1022, and 1024(b) (A-49). Yet, the

petitioner was not advised that the plan had been changed and was never furnished a summary of any of the "material modifications."

(3) They were required to furnish a copy of the governing documents of the plan within 30 days after the petitioner made a written request. Yet, the petitioner was first furnished a copy of the expired Northwestern plan in response to his request. Upon further inquiry, he was furnished a copy of the initial draft of the Great West plan and advised that the draft had not been approved. The petitioner was not furnished a copy of the application until after this litigation began, more than 120 days after the petitioner's request.

The decision of the District Court, affirmed without opinion, represents a significant erosion of the safeguards Congress wanted. That decision allowed a reduction of the petitioner's benefits based solely

on parol offsets. The application of parol evidence in this case is not based upon a local anomaly in the parol evidence rule. Its application in this case portends its application in all 50 states. The fact is, the permissible use of parol evidence in cases involving a contract required to be in writing is much more limited in Georgia than in most states. Cf. Freeman v. Baker, 147 Ga. App. 168, 248 S.E.2d. 298 (1978); 4 Williston on Contracts, §583 (3rd ed. 1961); Annot. 81 ALR2d 991, 999-1003, §4(a), 5; Corbin on Contracts, §§508-519 (1 Vol.ed. 1952).

The result reached by the District Court was not justified by any special circumstance. The defendants did not show that they failed to incorporate the offsets into the plan because of providential cause, a wrongful act of the plaintiff, or some other legally cognizable excuse. They offered no explanation as to why the offsets

were not included in the application or why a complete, formal plan including the offsets was not prepared in timely fashion. They made no showing, and none was required, of a good-faith effort to comply with their duties under ERISA. They simply testified that they intended to carry the old offsets forward into the new plan. Apparently, they were either ignorant of the requirements of ERISA, they forgot those requirements, or they ignored them.

While there might, in some exceptional circumstances, be a justification for creating a judicial exception to the ERISA requirements that plans be maintained in writing and administered in accordance with the writing, this case presents no such circumstance. ERISA is an extremely comprehensive and carefully drawn piece of legislation. It represents the response of Congress to significant abuses which have

occurred in the private employee benefit system.[10/]

In light of the present weakness of the social security system and the consequent increasing importance of private pensions, it is imperative that the mandate of ERISA be unerringly carried out. The message of ERISA is clear. It imposes special duties and responsibilities upon plan fiduciaries and it imposes civil and criminal liability for breaches of those responsibilities. See 29 U.S.C. §§1109 and 1131 (A-55, A-56).[11/] Fiduciaries who, through ignorance

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[10/] After conducting twelve years of investigation into abuses that stripped employees of benefits under private pension plans, Congress enacted ERISA to replace the Welfare and Pensions Plans Disclosure Act (Pub.L.No. 85-836, 72 Stat. 997 (1958). It had proved ineffective because of weak disclosure requirements and a still weaker enforcement mechanism. [1974] U.S. CODE CONG. & AD. News 4838, 4841.

[11/] 29 U.S.C. §1109 provides in part that: "Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from

or disregard, violate the mandates of ERISA, do so at their own peril.

It is true, that before the petitioner retired, he had no reason to expect disability benefits which were not subject to the offset provisions of the Northwestern plan. This is so because he was not furnished the governing document of the Great West plan or advised of the adoption of that plan before his retirement. Had he been furnished a copy of the only existing plan document,

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11/(Cont'd.) each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary...." (A-55). 20 U.S.C. §1131 provides in part that: "Any person who willfully violates any provision of part 1 of this subtitle [29 U.S.C. §§1021-1031], or any regulation or order issued under any such provision,; shall upon conviction be fined not more than $5,000 or imprisoned not more than one year, or both...." (A-56).

he would have rightly expected a benefit of $1,770 per month. The defendants' failure to inform the petitioner of the material changes in the plan was an ERISA violation. Because of this violation, the petitioner will never know, to a certainty, that he was not selected for a discriminatory application of benefit offsets.[12/] Because of this violation, the petitioner will never know, to a certainty, that the failure to advise him of the changes was not a deliberate act of deceit. This lawsuit resulted from the defendants' violation of ERISA and the suspicion the violation justifiably generated. ERISA was designed to prevent exactly what has occurred here, distrust and suspicion, uncertainty as to benefits and self-serving declarations by plan fiduciaries.

[12/] Plans like a disability plan in which the occurrence of claims is actuarially infrequent are highly susceptible to discriminatory administration. Under such plans, vague or imcomplete descriptions of benefits can be used to control benefit payments, depending upon who makes a claim, because the determination of a right to benefits in one case is not likely to affect other claimants.

If the ruling of the lower courts is not corrected, what would prevent the defendants in this case from doing the same thing again - adopting a new plan, evidencing it by a sketchy application and remaining "flexible"? What would prevent other fiduciaries from claiming the benefit of self-serving parol evidence to reduce the benefits of claimants who were in particular disfavor with the plan sponsor? The answer is, the District Court's opinion makes such occurrences likely.

The opinion presents no guidelines or limitations on the use of parol evidence to supplement plan documents. Yet, the use of parol evidence in the case of benefit plans is unusually risky because there is little likelihood that any participant will be in a position to offer evidence contrary to the claimed intention of the plan fiduciaries. Just as occurred in this case, most courts addressing such an issue will be forced to

proceed without the safeguard of conflicting interests among the parties with knowledge. This a world in which self-interest leads to discrimination and untruthfulness too frequently. For this reason, the court must not allow ERISA's preemptory regulatory scheme to be subverted by the application of a state parol evidence rule.

CONCLUSION

Because the Georgia law of parol evidence, as applied in this case, directly clashes with supreme federal law, and because Congress intended that ERISA alone govern the establishment, maintenance and disclosures of the plan at issue, the District Court erred in permitting the petitioner's benefits to be reduced by parol offsets. For these reasons, this petition for a writ of certiorari should be granted.

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APPENDIX

The judgment of the Eleventh Circuit Court of Appeals was issued without opinion under Circuit Rule 25. That rule provides as follows:

> RULE 25. AFFIRMANCE WITHOUT OPINION
>
> When the Court determines that any of the following circumstances exist:
>
> (a) judgment of the district court is based on findings of fact that are not clearly erroneous;
>
> (b) The evidence in support of a jury verdict is not insufficient;
>
> (c) the order of an administrative agency is supported by substantial evidence on the record as a whole;
>
> (d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;
>
> and the court also determines that no error of law appears and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

A copy of that judgment may be found at page A-37.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

HAROLD L. MYRON,	:	
	:	
Plaintiff,	:	CIVIL ACTION NO.
	:	C80-1428A
vs.	:	
	:	
TRUST COMPANY BANK LONG TERM DISABILITY BENEFIT PLAN, TRUST COMPANY BANK, and GREAT WEST LIFE ASSURANCE COMPANY,	:	
	:	
Defendants.	:	

ORDER

This action under The Employee Retirement Income Security Act of 1974, 29 U.S.C. §§1001, et seq., and the Court's pendent jurisdiction, is before the Court on plaintiff's motion to amend his complaint, defendants Trust Company Bank Long Term Disability Benefit Plan and Trust Company Bank's (hereinafter "the Bank") motion for summary judgment, defendant Great West Life Assurance Company's (hereinafter "Great West") motion for summary

judgment and plaintiff's cross-motion for summary judgment.

Motion to Amend

Defendants have filed no response to plaintiff's motion to amend the complaint. The Court therefore FINDS that this motion is unopposed and hereby GRANTS plaintiff's motion. Local Rule 91.2.

Motions for Summary Judgment

The basic undisputed "background" facts of this case (culled from the various statements of facts filed in support of the motions before the Court) are these:

The plaintiff, Harold L. Myron, is sixty years of age. Plaintiff served in the military for thirty years and retired from the United States Army as a full colonel in June 1973. From July 1973 through August 1, 1979 plaintiff was an employee of Trust Company Bank. Plaintiff retired from the bank due to total and

permanent disability effective August 1, 1979. At the time of his retirement, plaintiff's basic salary with the Bank was $35,400 per year.

As a result of his military service, plaintiff became eligible for and began receiving military retired pay as of August 1, 1979 [sic]. Effective April 1, 1978, plaintiff became eligible for and began to receive disability benefits from the Veterans Administration (VA). Effective September 1, 1979, plaintiff became eligible to receive 100 percent service-connected VA disability payments. Both of these payments have increased between the time of plaintiff's original eligibility and the filing of this suit.[1/]

[1/] The exact breakdown of the payments plaintiff is receiving is apparently in dispute. Plaintiff asserts that his military retirement pay is offset by his VA payments. Defendants contend (by implication) that the two payments are separate and that there is no such offset. At any rate, the totals reflected in plaintiff's answer to interrogatory number 2 are greater than the "maximum monthly indemnity" (see below) for which he is eligible.

In May 1980, plaintiff was awarded social security benefits in the amount of $485.50 per month. Those benefits were awarded retroactively to January 1, 1980.

Plaintiff, as of March 31, 1981, was receiving VA disability, social security disability, and military retirement pay totaling at least $3,875 per month or at least $46,500 per year. Plaintiff's Answers and Objections to Interrogatories Nos. 1, 2, 3; Appendix Tab B, Great West's Appendix to Statement of Undisputed Material Facts.

Sometime prior to 1976, Trust Company Bank initiated for its employees a long-term disability benefit plan. From July 15, 1975 through April 30, 1979, this plan was funded through an employee group long-term disability income insurance policy with Northwestern National Life Insurance Company (hereinafter "Northwestern").

In September of 1978, Great West submitted to Johnson & Higgins of Georgia, Inc. (an insurance consulting firm) a proposal containing its funding recommendation for a long-term disability insurance plan for Trust Company Bank. The basic provisions of this proposal were eventually accepted by Trust Company Bank as of May 1, 1979.

As of May 1, 1979, the Bank contracted with Great West to convert the funding of the plan to a self-funded program with claims adjudication and fund management services to be provided by Great West.

The Issues

There are two key questions to be decided here:

(1) What are the terms of the Trust Company Bank Long-Term Disability Benefit Plan which are applicable to plaintiff?

(2) Should plaintiff's military retirement pay, VA disability payments and social security disability payments be deducted from any payments to which he may be entitled under the Bank's benefit plan?

Under the terms of the Bank's benefit plan, the "maximum monthly indemnity" that the plaintiff is eligible to receive is $1,770 per month. This figure is equal to 60 percent of plaintiff's salary on the date of his disability, and is undisputed by the parties. What is disputed is how much of this $1,770 per month plaintiff is entitled to receive.

The center of the dispute is the following excerpt from the section of what, for now, will be called the original group disability insurance plan[2/] entitled "Income from Other Sources":

[2/] The original plan is that plan under which the Bank was operating prior

The total of an Insured's "income from other sources" is deducted from his Gross Monthly Indemnity to determine his Monthly Income Benefits and includes the following:

(a) Any benefits the Insured and his dependents are eligible to receive because of the Insured's disability or age under the Federal Social Security Act, Public Employees' Retirement Association, Railroad Retirement Act or any other Federal, State, County or Municipal Retirement Act or Law ...
....

(c) Any benefits the Insured is eligible to receive from a retirement plan, pension plan, or other similar plan for which the Insured's past or present employer has directly or indirectly sponsored, or for which such employer has paid any part of the cost or has made a payroll deduction.

(d) Any benefits the Insured is eligible to receive under Workmen's Compensation or similar legislation or under any governmental or private disability income plan which provides benefits for loss of time from

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2/ (Cont'd.) to the May 1, 1979 switchover from Northwestern to Great West. What actually constitutes "the Plan" is in dispute and the Court's characterization here is not a comment on the merits of that dispute, but rather is simply a convenient mode of reference.

> employment, for which the policy-holder or the Insured's past or present employer contributes or makes payroll deductions.

Allison Deposition, Exhibit 15.

Plaintiff, in his original complaint, asserted that he is entitled to receive $1,284.50 per month from the Bank under the benefit plan. This figure represents the $1,770 maximum monthly indemnity less the $485.50 per month plaintiff initially received in social security disability benefits. Complaint, ¶16. In his amended complaint, plaintiff asserts that he is entitled to the entire $1,770 in monthly benefits under the Plan. First Amendment to Complaint, ¶16.

It is plaintiff's contention that his military retirement pay, his VA disability benefits, and (now, apparently) his social security disability benefits, should not be offset against his benefits under the Bank's plan. Plaintiff offers three theories to support his position. The

first two are premised on the argument that "the plan" under which the Bank was administering its disability benefit program prior to May 1, 1979, and from which the above-quoted excerpt was taken, was terminated when the Bank switched insurance companies from Northwestern to Great West. Because the relevant ERISA section requires that every employee benefit plan be "maintained pursuant to a written instrument," 29 U.S.C. §1102(a)(1), and because, under plaintiff's argument, the original plan was no longer binding, another "written instrument" must have set out the terms of the plan.

Consequently, plaintiff's first theory is that the Bank's application for insurance to Great West and Great West's acceptance letter constitute an insurance policy between the Bank and Great West, despite the fact that these documents are incomplete and contradictory, because

"they more accurately reflect the status of the Bank's long-term disability plan as of May 1, 1979, than any other document which existed at that time." Plaintiff's Reply Brief at 9. As the application did not include any offsets for income from other sources or even refer to those offsets in the (as plaintiff characterizes it) "preexisting Northwestern National policy," plaintiff argues he is entitled to the full disability payment of $1,770 per month.

Secondly, plaintiff argues that if the Court does not accept the application as being the controlling plan document, an initial draft prepared by Great West in December 1979 which was sent to the Bank through Johnson & Higgins for approval and/or comment constitutes the controlling plan document. This draft contained offset provisions which, plaintiff argues, would only encompass his social security

payments, and, therefore, he would be entitled under this "plan" to the full monthly benefit less the amount of the social security payments.

Plaintiff's final theory is that even if the case is controlled by the "Northwestern National document," the relevant portions of which are set out above, the plaintiff is still entitled to disability benefits of $1,284.50 per month because his military retirement pay and VA benefits do not fit into the various categories of "income from other sources" listed in that document.

Plaintiff also seeks to recover damages under ERISA of $100 per day plus attorneys' fees due to the alleged failure of defendants to provide him with copies of the benefit plan in effect on the date of his disability. Finally, plaintiff seeks $100,000 in exemplary damages against defendants.

The position of all of defendants is simply that "the Plan" in effect prior to May 1, 1979 remained in effect with only two modifications which are irrelevant here[3/] after the Bank switched insurance companies from Northwestern to Great West. It is their contention that the Plan itself is a separate entity from the insurance policy, and that all of the parties involved in establishing the new setup agreed that the provisions of the plan entitled "Long Term Disability for Employees of Trust Company of Georgia, et al.," Allison Deposition, Exhibit 15, were to remain in effect after May 1, 1979. It is asserted by defendants that the change to Great West merely altered the funding arrangement of the plan and not the plan itself, and that Great West was simply to

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[3/] These modifications dealt with a liberalized eligibility provision and an increase in the maximum monthly benefit provided for by the plan.

supply their administrative expertise in implementing the Bank's benefit plan.

The defendants argue that plaintiff's military retirement pay and VA benefits do fall under the "Income from other sources" offset provisions of that Plan; that because of this, plaintiff's income from other sources exceeds his total "Gross Monthly Indemnity" of $1,770, and that, therefore, plaintiff is entitled only to the $50 per month minimum payment provided for in the Plan.

Finally, defendants argue that because plaintiff was provided with a copy of the Plan in Exhibit 15, no ERISA violation occurred. Great West argues further that it was not the ERISA Plan administrator under the provisions of 29 U.S.C. 1002(16) and that, therefore, it was under no obligation to supply plaintiff with a copy of the Plan as ERISA requires of the employer.

The Standard

Under the terms of Federal Rule of Civil Procedure 56(c), a motion for summary judgment may be granted only if there is no issue as to any material fact and the law favors the moving party. Marcus v. St. Paul Fire & Marine Insurance Co., 651 F.2d 379, 382 (5th Cir. 1981).

As defendant Trust Company points out, despite the many statements of facts and statements of disputed facts filed in support of an in opposition to the motions in this case, no real material facts are disputed. The dispute is in the legal interpretation of the effect of the facts, and in which facts are decisive of the issues. Consequently, the case is ripe for summary judgment disposition.

What is "The Plan"?

As noted above, all of the defendants contend that the document entitled "Long Term Disability for Employees of Trust

Company of Georgia, et al." which contains the offset provisions at issue constitutes "the Plan" by which the outcome must be governed. They attempt to draw a distinction between the terms "plan" and "policy," and argue that, although the policy was changed from one with Northwestern to one with Great West, the parties (i.e., the defendants) all agreed that the plan which was in effect prior to the change in insurance companies was to remain in effect.

This argument cannot stand in light of the applicable ERISA provision. Twenty-nine U.S.C. §1102 provides in relevant part:

> (b) Every employee benefit plan shall --
>
> (1) provide a procedure for establishing and carrying out a funding policy and method consistent with the objectives of the plan and the requirements of this subchapter,
>
> (2) describe any procedure under the plan for the allocation of responsibilities for the operation and administration of the plan...,

> (3) provide a procedure for amending such plan, and for identifying the persons who have authortiy to amend the plan, and
> (4) specify the basis on which payments are made to and from the plan.

As plaintiff correctly points out, the Northwestern "arrangement," of which the document defendants label "the Plan" was an integral part, expired by its own terms on April 30, 1979. Plaintiff's Brief at 3. That part of the Northwestern documents which contains the offset provisions cannot in and of itself be considered a "plan" under section 1102(b), because the first three elements listed in that section no longer existed when the arrangement between the Bank and Northwestern was terminated. "The Plan" does not, as the Bank argues, "continue[] in existence regardless of changes in funding or administration." Trust Company Reply Brief at 7. Section 1102 clearly shows that funding and administration are integral

parts of a "plan" under ERISA. However, as will be set out below, the Court finds that this mistake in terminology is not fatal to defendants' position on the ultimate outcome of this case.

It is plaintiff's primary contention that the Bank's written application for insurance, which was accepted and administered by Great West as though a written policy had been issued, is "the Plan" which governs the disposition of this case. The application, Gill Deposition, Exhibit 19, does contain the four required features of an ERISA "plan" as set out in section 1102(b). There is also no mention of any offset provisions in the application, and, therefore, plaintiff argues that he is entitled to the full $1,770 per month disability payment.

If only the provisions of the application for insurance were relevant here, the Court would be inclined to rule for

plaintiff. However, because of the admissible parol evidence existent here, the Court cannot do so.

Defendants' basis for asserting that the offset provisions set out in the plan which existed prior to the change to Great West is that all of the parties to the formulation of the new plan agreed that this would be the case. This contention is supported by the following evidence:

(1) The affidavit of Gregory Jon Allison, the group marketing officer of defendant Great West who negotiated the conversion on behalf of Great West, which states that:

> During the negotiations prior to and at the time the agreement was reached to commence coverage of the Plan under Great West's self-funding proposal, Great West and Trust Company Bank, through Mr. Hillegas [of Johnson & Higgins], agreed that the institution of this self-funding program would not alter the benefits available to employees under the Plan, and that the

benefit provisions of the Great West policy would remain consistent with the existing Plan with only two minor exceptions [which were set out above]....

Allison Affidavit, ¶4, Appendix Tab C, Defendant Great West's Appendix to its Statement of Undisputed Material Facts.

(2) The affidavit of W. Moses Bond, a group vice president of defendant Trust Company Bank, who engaged Johnson & Higgins to consult with the Bank regarding the change in insurance companies and plan administration. He states:

> The intention of Trust Company Bank in the transition from a plan insured by Northwestern National Life Insurance Company to a self-funded plan was that the terms of the plan itself would remain unchanged.... Specifically, the terms of the Plan with respect to deductions for income from other sources and the calculation of monthly benefits were to remain unchanged.

Bond Affidavit, ¶4, Trust Company's Motion for Summary Judgment, Exhibit B.

(3) The affidavit of James T. Hillegas, a vice president of Johnson & Higgins, who was primarily responsible for providing that firm's services to Trust Company in the conversion and negotiation process. He states:

> The intention of all of the parties to the transition from Northwestern National Life Insurance Company to the new funding arrangement was that the terms of the Plan itself would remain unchanged.... Specifically, the terms of the Plan with respect to deductions for income from other sources and the calculation of monthly benefits were to remain unchanged.

Hillegas Affidavit, ¶9, Trust Company's Motion for Summary Judgment, Exhibit C.

(4) The deposition testimony of Betty J. Gill, claims manager for Great West, who was informed

> at the time of the conversion that the terms of the Northwestern Plan were to be "duplicated" in the Great West Plan. Gill Deposition, pp.45-46.

Plaintiff argues that these statements should not be accepted by the Court because the application which the Bank sent to Great West contained the following language:

> It is hereby declared and agreed that all statements, representations and answers made in this application are a consideration for and a basis of the contract(s) of insurance between the Applicant and the Company and whether written or printed are declared to be true, full and complete; that no other statement, representation, or information shall be binding upon or affect the rights of the Company....

Plaintiff asserts that this language constitutes a merger clause that clearly bars the incorporation of the offset provisions of the Northwestern plan into the Great West plan, because there

is no mention of or reference to those provisions in the application. Plaintiff notes further that other portions of the Northwestern plan were specifically referred to in the application. Plaintiff's Brief at 3-4. Plaintiff, however, has offered no evidence to rebut the statements of the various affiants.

In the first place, as the Bank points out in its reply brief at page 11, the clause in question is not really a merger clause. It says that Great West is not bound by any statement not contained in the application, and it says that "all statements, representations and answers" made in the application are "true, full and complete." The clause does not state, as does the merger clause in Johnson v. Ford Motor Credit Co., 142 Ga. App. 547, 548 (1977), cited by plaintiff, that "[t]his contract constitutes the entire agreement between the parties...."

It is well settled in both Georgia and federal law that the evidence in the affidavits and depositions can be considered in a situation such as this. GEORGIA CODE ANN. §20-704(1) states:

> Parol Evidence is inadmissible to add to, take from, or vary a written contract. All the attendant and surrounding circumstances may be proved, and if there is an ambiguity, latent or patent, it may be explained; so if a part of a contract only is reduced to writing ..., and it is manifest that the writing was not intended to speak the whole contract, then parol evidence is admissible.

(Emphasis added.)

Georgia case law is even more clear on this point. The case of Forsyth Manufacturing Co. v. Castley, 112 Ga. 199, 211 (1900), held that

> a party is at liberty to prove "the existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, if from the circumstances of the case the court infers that the parties did not intend the document to be a complete and final statement of the whole of the transactions between them.

(Citation omitted.) Accord, Hatley v. Frey, 145 Ga. App. 658, 659 (1978); Ansley v. Forest Services, Inc., 135 Ga. App. 745, 747 (1975). See also, Langenback v. Mays, 205 Ga. 706, 711 (1949).

Plaintiff himself points out that the application is "silent" as to the offset provisions. As there is admittedly no reference to these provisions, there is no way they can be considered "inconsistent" with the terms of the Trust Company-Great West contract. Finally, the "circumstances of the case" -- i.e., the aforementioned affidavits, the lack of many necessary terms and provisions in the application itself, and the fact that several draft plans have arisen during the course of this action -- certainly allow the Court to infer that the defendants "did not intend the document to be a complete and final statement of the whole of the transactions between them."

Federal law also supports consideration of this evidence. The Fifth Circuit has held that "[i]n Georgia, construction of insurance contracts begins with the premise that a policy must 'be construed so as to carry out the true intention of the parties. All other rules of contract interpretation and construction are subservient to that principle....'" National Hills Shopping Center, Inc. v. Liberty Mutual Insurance Co., 551 F.2d 655, 657 (5th Cir. 1977) (citation omitted). Furthermore,

> Extrinsic evidence may be even more helpful in deciding whether there has been an integration, and no rule bars "parol evidence" or any other relevant evidence for the purpose of determining whether the parties have agreed upon the writing as a complete and accurate statement of what is agreed between them.

Carolina Metal Products Corp. v. Larson, 389 F.2d 490, 493 (5th Cir. 1967). See also Vanston v. Connecticut General Life Insurance Co., 482 F.2d 337, 341 (5th Cir. 1973) (parol evidence rule did not prevent

plaintiff from proving additional insurance contract terms which were not inconsistent with those embodied in the written agreement); Matthews v. Drew Chemical Corp., 475 F.2d 146 (5th Cir. 1973).

The true intention of the parties to the insurance contract here was obviously to follow the offset provisions set out in the original Northwestern plan. Therefore, that is what the Court will allow. The Court FINDS that the plan which governs here is the combination of the application by the Bank to Great West and the benefit provisions of the original Northwestern plan (and not "the Plan" as defendants refer to it) which the defendants intended to be carried over into the new Great West plan. In particular, the Court HOLDS that the relevant offset provisions for "income from other sources" are those provisions contained in the original Northwestern plan set out above.

ERISA Violations

While it is true that 29 U.S.C. §1102(a)(1) requires that every employee benefit plan "shall be established and maintained pursuant to a written instrument," the Court has found no authority that states that this written instrument must be one all-inclusive document. Indeed, the legislative history indicates that Congress contemplated the possibility of more than one writing constituting an ERISA plan. The conference committee report states: "A written plan is to be required in order that every employee may, on examining the plan documents, determine exactly what his rights and obligations are under the plan." 1974 U.S. Code Cong. & Ad. News, 5077-78 (emphasis added). Certainly, the statement in the application which plaintiff erroneously designated as a merger clause could cause confusion to a plan beneficiary as to

whether the Northwestern plan benefit provisions apply under the Great West plan. It is also true that "the plan" the Court has found to be controlling here is not a fully complete one, as evidenced by the fact that several subsequent draft plans have arisen and none has as yet been accepted as the final benefit plan. However, no employee of the Bank was ever told that any other provisions would apply, and the employees, including plaintiff, were furnished with copies of the Northwestern plan benefit provisions. Therefore, although the "written instrument" requirement was not met as perfectly as it could have been, the Court FINDS that there was no violation of this ERISA provision. Cf. Johnson v. Central States, Southeast & Southwest Areas Pension Fund, 513 F.2d 1173 (10th Cir. 1975) (though pension plan description in booklet furnished employee, together with plan

itself, was unsatisfactory, pension fund did not violate Welfare and Pension Plans Disclosure Act).

As the Court has set out "the plan" which is determinative of this case, and since defendants provided plaintiff with copies of both the Northwestern plan and the application which together contain all of the aspects of the Plan relevant to this action, the Court HOLDS that there was no violation by defendants of 28 U.S.C. §1132 for "refusal to supply requested information."

Do the Offset Provisions Apply to Plaintiff's Military Retirement Pay and VA Benefits?

The Court has decided that the offset provisions in the Northwestern plan document govern the disposition of this case. Plaintiff does not deny that the social security benefits he receives are covered by those offset provisions. Indeed, he

acknowledges that the maximum monthly benefit he is entitled to under the controlling document is $1,284.50 -- the $1,770 maximum less the $485.50 he was initially eligible to receive in social security benefits. Plaintiff's Brief at 12. Therefore, the Court must determine if plaintiff's military retirement pay and VA disability payments are covered under the plan's offset provisions.

The Court will first deal with the military retirement pay, because if those benefits are covered by the offset provisions, plaintiff would be over his $1,770 maximum monthly benefit regardless of whether the VA benefits are offset from the retirement pay or added to it.

The Court need look no further than the language of subsection (c) of the offset provisions, which states: "Any benefits the insured is eligible to receive from a retirement plan, pension

plan or any other similar plan for which the Insured's past or present employer has directly or indirectly sponsored, or for which such employer has paid any part of the cost or has made payroll deduction..." will be offset as "income from other sources" from benefits provided under the Bank's plan.

Plaintiff makes three arguments against the applicability fo this section to his military retirement pay. The first two -- that "[o]ffset (c) is, by its terms directed to retirement and pension plans (i.e., private retirement and pension arrangements establsihed by a trust or other plan document) of the type typically covered by ERISA," Plaintiff's Brief at 14, and that offset (c) is "related to private retirement and pension plans" and does not "relate to governmental retirement acts or laws," Id. at 16 -- are simply not supported by the language of

the offset provision. The court finds no distinction in (c) between plans established by a public employer and plans established by a private employer. Finally, plaintiff makes a creative argument that the, as he calls them, "limited offsets provided by subparagraphs (a) and (d)" would be rendered meaningless by giving a broad interpretation to offset (c) which would include the military retirement pay in question. Plaintiff's Reply Brief at 16-18. The Court is simply not persuaded that the construction given to these terms by plaintiff is correct.

The Court FINDS that the language of paragraph (c) above, clearly encompasses the military retired pay plaintiff is receiving. The benefits plaintiff is receiving are from a "retirement plan" for which plaintiff's past employer -- The

United States government -- has paid all of the cost.[4/]

Finally, the Court notes that plaintiff has filed a "notice of deposition upon written questions" for Mr. Marvin Lind, Director of Life and Disability of Northwestern National Life Insurance Company. Plaintiff's attorney indicates in his affidavit that he "has obtained [from an unnamed source at Northwestern] an oral interpretation indicating that the plaintiff's military retirement income would not be offset by Northwestern National against his basic disability benefit." Sims Affidavit, ¶4, Plaintiff's Appendix Tab 2. Apparently, the deposition testimony plaintiff hopes to obtain from Mr. Lind seeks in part to verify this assertion. See "Plaintiff's Direct Examination" question 18.

4/The Court also finds that the language in the provision in question is much more specific than that in the plan dealt with in Gladden v. Pargas, Inc. of Waldorf, Md., 579 F.2d 1901 (4th Cir. 1978), cited by plaintiff, and, therefore, that case's holding is of no bearing here.

The Court is not convinced that this testimony is relevant enough to its decision here to await completion of this deposition testimony. It was clearly the intention of the parties to the Great West plan that plaintiff's retirement pay be considered "income from other sources," see quoted sections of affidavits set out above, and the Court has found that subsection (c) can reasonably be interpreted to so include those benefits.

Therefore, as the Court has decided that plaintiff's military retired pay is covered by the Plan's offset provisions, and since at all times relevant to this action, plaintiff's combined social security benefits and military retired pay was greater than the $1,770 maximum monthly benefit for which he is eligible,[5/]

5/Plaintiff became eligible for benefits under the Plan on February 1, 1980. At that time he was (retroactively) receiving $485.50 per month in social security benefits and $1,642.86 per month in military retirement pay ($2,785.86 less $943.00 in VA benefits) for a total of $2,128.36 per month in income from other sources.

the Court HOLDS that plaintiff is only entitled to receive the $50 per month minimum benefit under the Bank's disability plan.

Also, as defendants have prevailed on the substantive issues, plaintiff's claims for attorney's fees and exemplary damages must also fail.

In sum, for the reasons set out in this opinion, the Court hereby:

GRANTS Plaintiff's motion to amend complaint;

GRANTS all defendants' motions for summary judgment; and

DENIES plaintiff's motion for summary judgment.

SO ORDERED, this 15th day of September, 1981.

ORINDA D. EVANS
United States District
Judge

[Filed Sept. 16, 1981]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 81-7858

D.C. Docket No. CV-80-1428-A

HAROLD L. MYRON,

Plaintiff-Appellant,

versus

TRUST COMPANY BANK
LONG TERM DISABILITY
BENEFIT PLAN, ET AL.,

Defendants-Appellees.

Appeal from the United States
District Court for the Northern
District of Georgia

(October 20, 1982)

Before JOHNSON and ANDERSON, Circuit Judges,

and HUNTER*, District Judge. PER CURIAM:

AFFIRMED. See Circuit Rule 25.

"Costs taxed against plaintiff-appellant."

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*Honorable Edwin F. Hunter, Jr., United States District Judge for the Western District of Louisiana, sitting by designation.

ISSUED AS MANDATE: JAN 13 1983
[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 81-7858

HAROLD L. MYRON,

Plaintiff-Appellant,

versus

TRUST COMPANY BANK
LONG TERM DISABILITY
BENEFIT PLAN, ET AL.,

Defendants-Appellees.

Appeal from the United States
District Court for the Northern
District of Georgia

ON PETITION FOR REHEARING

Before JOHNSON and ANDERSON, Circuit Judges, and HUNTER*, Judge. PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ R. Lanier Anderson
United States Circuit Judge

*U.S. District Judge for the Western District of Louisiana, sitting by designation.

[Filed Dec. 1, 1982]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF GEORGIA
ATLANTA DIVISION

HAROLD L. MYRON	:	CIVIL ACTION FILE
	:	NO. C80-1428A
vs.	:	
	:	
TRUST COMPANY BANK LONG TERM DISABILITY BENEFIT PLAN, TRUST COMPANY BANK, GREAT WEST LIFE ASSURANCE COMPANY	:	JUDGMENT

This action came on for consideration before the Court, Honorable Orinda D. Evans, United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered, pursuant to Order of September 16, 1981

It is Ordered and Adjudged that plaintiff take nothing; that the action be dismissed; and that defendants TRUST COMPANY BANK LONG TERM DISABILITY BENEFIT PLAN, TRUST COMPANY BANK, GREAT WEST LIFE ASSURANCE COMPANY recover of plaintiff HAROLD L. MYRON their costs of this action.

Dated at Atlanta, Georgia, this 21st day of September, 1981.

FILED AND ENTERED
IN CLERK'S OFFICE
September 21, 1981
BEN H. CARTER, CLERK

BY: _____
Patricia M. Ivester
Deputy Clerk

BEN H. CARTER
Clerk of Court

BY: _____
Patricia M. Ivester
Deputy Clerk

EMPLOYEE RETIREMENT INCOME SECURITY ACT
TITLE I, SUBTITLE A, §2
29 U.S.C. §1001

§1001. Congressional findings and declaration of policy

(a) Benefit plans as affecting interstate commerce and the Federal taxing power. The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce

because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment

are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

(b) Protection of interstate commerce and beneficiaries by requiring disclosure and reporting, setting standards

of conduct, etc. for fiduciaries. It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions and ready access to the Federal courts.

(c) Protection of interstate commerce, the Federal taxing power, and beneficiaries by vesting of accrued benefits, setting minimum standards of funding, requiring termination insurance. It is hereby further declared to be the policy of this Act to protect interstate commerce, the Federal taxing power, and the interests

of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.

EMPLOYEE RETIREMENT INCOME SECURITY ACT
TITLE I, SUBTITLE A, §3(a)
(2)(A), (7) and (14)
29 U.S.C. §1002

§1002. Definitions

For purposes of this title:

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organizatio or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries through the purchase of insurance or

otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services or (B) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 [29 U.S.C. §186(c)] (other than pensions on retirement or death, and insurance to provide such pensions).

(2)(A) Except as provided in subparagraph (B), the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstnaces such plan, fund, or program--

(i) provides retirement income to employees, or

(ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan...

(7) The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit...

(14) The term "party in interest" means, as to an employee benefit plan--

(A) any fiduciary (including, but not limited to, any administrator, officer, trustee, or custodian), counsel, or employee of such employee benefit plan....

EMPLOYEE RETIREMENT INCOME SECURITY ACT
TITLE I, SUBTITLE B, PART 1,
§104(b)(1) and (4)
29 U.S.C. §1024

§1024. Filing and furnishing of information

(b) Publication of summary plan description and annual report to participants and beneficiaries of plan. Publication of the summary plan descriptions and annual reports shall be made to participants and beneficiaries of the particular plan as follows:

(1) The administrator shall furnish to each participant, and each beneficiary receiving benefits under the plan, a copy of the summary, plan description, and all modifications and changes

referred to in section 102(a)(1) [29 U.S.C. §1022(a)(1)]-

(A) within 90 days after he becomes a participant, or (in the case of a beneficiary) within 90 days after he first receives benefits, or

(B) if later, within 120 days after the plan becomes subject to this part....

(4) The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description, plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated. The administrator may make a

reasonable charge to cover the cost of furnishing such complete copies. The Secretary may be [sic] regulation prescribe the maximum amount which will constitute a reasonable charge under the preceding sentence....

EMPLOYEE RETIREMENT INCOME SECURITY ACT
TITLE I, SUBTITLE B, PART 4,
§402(a) AND (b)
29 U.S.C. §1102

§1102. Establishment of plan

(a) Named fiduciaries. (1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

(2) For purposes of this title, the term "named fiduciary" means a fiduciary who is named in the plan instrument,

or who, pursuant to a procedure specified in the plan, is identified as a fiduciary (A) by a person who is an employer or employee organization with respect to the plan or (B) by such an employer and such an employee organization acting jointly.

(b) Requisite features of plan. Every employee benefit plan shall-

(1) provide a procedure for establishing and carrying out a funding policy and method consistent with the objectives of the plan and the requirements of this title,

(2) describe any procedure under the plan for the allocation of responsibilities for the operation and administration of the plan (including any procedure described in section 405(c)(1) [29 U.S.C. §1105(c)(1)]),

(3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan, and

(4) specify the basis on which payments are made to and from the plan....

EMPLOYEE RETIREMENT INCOME SECURITY ACT
TITLE I, SUBTITLE B, PART 4, §404(1)
29 U.S.C. §1104

§1104. Fiduciary duties

(a) Prudent man standard of care.

(1) Subject to sections 403(c) and (d) [29 U.S.C. §1103(c) and (d)], 4042 [29 U.S.C. §1342], and 4044 [29 U.S.C. §1344], a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and--

(a) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent

with the provisions of this title or title IV.

EMPLOYEE RETIREMENT INCOME SECURITY ACT
TITLE I, SUBTITLE B, PART 4, §409(a)
29 U.S.C. §1109

§1109. Liability for breach of fiduciary duty

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through the use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 411 of this Act [29 U.S.C. §1111].

EMPLOYEE RETIREMENT INCOME SECURITY ACT
TITLE I, SUBTITLE B, PART 5, §501
29 U.S.C. §1131

§1131. Criminal penalties

Any person who willfully violates any provision of part 1 of this subtitle [29 U.S.C. §§1021 et seq.], or any regulation or order issued under any such provision, shall upon conviction be fined not more than $5,000 or imprisoned not more than one year, or both; except that in the case of such violation by a person not an individual, the fine imposed upon such person shall be a fine not exceeding $100,000.

EMPLOYEE RETIREMENT INCOME SECURITY ACT
TITLE I, SUBTITLE B, PART 5
§502(c) and (g)
29 U.S.C. §1132

§1132. Civil enforcement

...

(c) Administrator's refusal to supply requested information. Any adminis-

trator who fails or refuses to comply with a request for any information which such administrator is required by this title to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper....

(g) Attorney's fees and costs; awards in actions involving delinquent contributions. (1) in any action under this title (other than an action described in paragraph 2) by a participant, benefi-

ciary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

EMPLOYEE RETIREMENT INCOME SECURITY ACT
TITLE I, SUBTITLE B, PART 5,
§514(a) and (c)
29 U.S.C. §1144

§1144. Other laws

(a) Supersedure; effective date. Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) [29 U.S.C. §1003(a)] and not exempt under section 4(b) [29 U.S.C. §1003(b)]. This section shall take effect on January 1, 1975...

(c) Definitions. For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having

the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality or either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this title.

UNITED STATES CONSTITUTION,
ARTICLE VI, SECTION 2

...

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.